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No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS,

Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, PH.D.,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

AMICUS CURIAE BRIEF OF 43 LOCAL GOVERNMENTAL AIRPORT PROPRIETORS IN SUPPORT OF PETITIONER.

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INTEREST OF AMICI CURIAE

Forty-three local governmental entities from across the United States that own or operate public airports have joined to file this brief as *amici curiae*.[1] These entities represent a wide variety of forms of local government that all will be affected by the Court's decision in this case. Twenty-six are cities or counties (or departments of city or county government) that own or operate public airports;[2] thirteen are special purpose local airport authorities;[3] and four are transportation

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[1] Letters of consent for the filing of this brief as *amici curiae* have been submitted to the Clerk in accordance with Rule 37.3 of the Rules of this Court. This brief was not authored in whole or in part by counsel for either party, and no person or entity other than the 43 *amici curiae* listed in footnotes 2-4 *infra* made a monetary contribution to the preparation or submission of this brief.

[2] The City of Albuquerque, New Mexico, City of Amarillo, Texas, City of Austin, Texas, City of Bangor, Maine, City of Billings, Montana, City of Boise, Idaho, City of Burlington, Vermont, City of Charlotte, North Carolina, City of Cleveland, Ohio, City of Colorado Springs, Colorado, Cities of Dallas and Fort Worth, Texas, City of Dayton, Ohio, City and County of Denver, Colorado, City of Des Moines, Iowa, City of Houston, Texas, City of Kansas City, Missouri, City of Oklahoma City, Oklahoma, City of Philadelphia, Pennsylvania, City of St. Louis, Missouri, City of Salt Lake City, Utah, City of Tulsa, Oklahoma, Town of Islip, New York, Kent County, Michigan, Monroe County, New York, Wayne County, Michigan and Westchester County, New York.

[3] The Albany County Airport Authority, Allegheny County Airport Authority, Bishop International Airport Authority, City of Fargo Municipal Airport Authority, Columbus Airport Authority, Fort Wayne/Allen County Airport Authority, Indianapolis Airport Authority, Kenton County Airport Board, Memphis Shelby County Airport Authority, Metropolitan Washington Airports Authority, Regional Airport Authority of Louisville and Jefferson County, (continued...)

authorities created under state law (or interstate compact) to own and operate public airports.[4] Collectively, the *amici* own or operate many of the nation's largest public airports, serving hundreds of millions of passengers each year.

The resolution of the question pending before this Court – whether *any* local governmental entity is a "person" subject to *qui tam* liability under § 3729(a) of the False Claims Act – potentially will dispose of an action pending in the Northern District of Ohio in which all of these entities have been named as defendants. The relator in that action, captioned *United States ex rel. Pram Nguyen* v. *City of Cleveland, Ohio, et al.* (No. 1:00 CV 208), has alleged in his *qui tam* complaint that each of these governmental entities has made false assurances to the Federal Aviation Administration ("FAA") about compliance with federal environmental laws in order to obtain billions of dollars in grants under the federal airport improvement program ("AIP"). The Department of Justice has declined to intervene. The 43 entities that submit this brief jointly have moved to dismiss the action on a number of grounds, including most prominently that they

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(continued...)

Rickenbacker Port Authority, and Toledo-Lucas County Port Authority.

[4] The Port Authority of New York and New Jersey, Niagara Frontier Transportation Authority, Massachusetts Port Authority, and the Minneapolis-St. Paul Metropolitan Airports Commission.

are immune from suit under § 3729(a) of the False Claims Act because they are not "persons" subject to *qui tam* liability. They have also moved to dismiss on the basis of misjoinder and lack of particularity.[5]

The outcome of Cook County's appeal is of vital interest to the millions of constituents of the 43 local governmental entities that submit this brief. Across the country, these public airport proprietors currently are undertaking, or are planning to undertake, massive airport capital improvement projects and, in the wake of the events of September 11, 2001, to institute new security programs. If they are required to pay a punitive, treble damages judgment in the *Nguyen* action that could run into the billions of dollars, they would be forced to reduce, or even eliminate, the financing of these essential public infrastructure projects. Moreover, to cover the costs of such a massive judgment, they would be forced to turn to innocent travelers and taxpayers to foot the bill. These airport proprietors would have no choice but to reduce existing airport services, increase airport charges affecting the airlines and their passengers, and in many cases, increase the tax burden on the public at large.

Further, an adverse decision in this case could unjustly destroy the benefits that the traveling public and the federal government, as well as the *amici*, have reaped from the AIP. The

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[5] The motion to dismiss has been pending in the Northern District of Ohio since March 15, 2002.

amici have used all of the billions of AIP grant dollars they have received precisely as the FAA intended: they have built and improved their airport infrastructure to serve the traveling public. The relator has made no allegation that any of the 43 *amici* have misspent even a single cent of the billions of dollars they have received in AIP grants.[6]

On behalf of their blameless constituents, this diverse group of local governmental organizations urges the Court to reverse the decision of the Seventh Circuit, and hold that *all* forms of local government are immune from liability under § 3729(a).

SUMMARY OF ARGUMENT

In its decision below, the Seventh Circuit held that local governmental entities such as Cook County, Illinois, are "persons" subject to punitive damages in *qui tam* actions brought under § 3729(a) of the False Claims Act. Because that decision runs contrary to established Supreme Court precedent, the purpose of the False Claims Act and sound public policy, this Court should reverse the decision by the Court of Appeals.

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[6] The relator, Pram Nguyen, has never sought to trigger any enforcement action by the FAA, which has broad powers to investigate and prosecute any violations of AIP grant assurances. *See* 14 C.F.R. Parts 13, 16 (2002).

Section 3729(a) of the False Claims Act subjects to treble damages any "person" who submits a false claim to the federal government, but it does not define what it means by "person." In the absence of such a definition, if the Court has any doubt whether the term "person" includes local governmental entities, it should resort to the application of longstanding presumptions governing the interpretation of federal statutes.

This Court has held that absent express Congressional intent, local governmental entities cannot be subjected to punitive damages under a federal statute. This Court also recently held that the mandatory treble damages provided by § 3729(a) are punitive damages. Accordingly, local governments cannot be subjected to liability under the Act absent clear evidence that Congress intended such a result.

There is no evidence that Congress intended to subject any type of local governmental entity to punitive damages under the False Claims Act. When it inserted the mandatory treble damages provision in 1986, Congress was aware that the mandatory treble damages would be treated as punitive damages and, consequently, that local governmental defendants presumptively would be immune from suit. However, Congress did not define "person" in 1986 to include any form of governmental defendants or otherwise express Congressional intent to subject local governmental entities to punitive damages.

A countervailing interpretive presumption relied on by the Seventh Circuit in its decision below – that the word "person" in a federal statute includes local governments – must yield to the longstanding presumption of local governmental immunity from punitive damages.

Finally, public policy dictates that local governmental entities are not "persons" subject to liability under the False Claims Act. Neither of the traditional functions of punitive damages – retribution or deterrence – would be served by imposing treble damages against governmental entities. Indeed, innocent citizens typically will bear the burden of a treble damages judgment against a local governmental entity because the entity will have no choice but to pass along the cost of the judgment to blameless citizens in the form of reduced or more expensive public services, or higher taxes.

ARGUMENT

There is no doubt that since 1986, the False Claims Act has imposed mandatory punitive damages upon any "person" found to be liable in a *qui tam* action under 31 U.S.C. § 3729(a). *See Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000) (the Act now "imposes damages that are essentially punitive in nature"); *see also United States ex rel. Dunleavy* v. *County of Delaware*, 279 F.3d 219, 223 (3d Cir. 2002); *United States ex rel. Chandler* v. *Cook County*, 277 F.3d 969, 977 (7th Cir. 2002); *United States ex rel. Garibaldi* v. *Orleans Parish Sch. Bd.*, 244 F.3d 486, 491 n.5 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 808 (2002).

The False Claims Act has never provided a definition of "person" as that term is used in § 3729(a). *See Stevens*, 529 U.S. at 782-783 and n.12. The petitioner, Cook County, properly has observed that, despite the absence of such a definition, the plain language of the False Claims Act, read in context, reveals that the term "person" in the liability provisions of the Act has never included local government. *Brief of Petitioner*, Section I.A. However, if the Court were to determine that the plain language of the statute does not resolve whether local governments are subject to liability under § 3729(a), it then should assess whether any common law interpretive presumptions may aid the Court in interpreting the term "person" as it is used in the current iteration of the statute. *See Stevens*, 529 U.S. at 780 (recognizing that, in the absence of a specific definition of "person" in the statute, it was required to "apply . . . our longstanding interpretive presumption that 'person' does not include the sovereign" to determine whether States are "persons" subject to liability).

I. LOCAL GOVERNMENTS ARE NOT "PERSONS" UNDER § 3729(a) BECAUSE CONGRESS HAS NOT *EXPRESSLY* SUBJECTED THEM TO PUNITIVE DAMAGES.

A. Local Governmental Entities Are Immune From Punitive Damages Absent A Clear Statement Of Congressional Intent.

When Congress amended the False Claims Act in 1986 to provide for mandatory punitive damages, it implicated the common law presumption that punitive damages may not be imposed against local governmental entities. *See Stevens*, 529 U.S. at 784-785, citing *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 262-263 (1981)(holding that the imposition of the Act's mandatory punitive damages against state governments "would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities"). In *Newport*, the Court addressed whether a city could be held liable for punitive damages under 42 U.S.C. § 1983. It held that local governmental entities are immune from punitive damages under a federal statute, so long as (1) Congress has not expressed clearly in the statute its intent to subject local governments to liability for such damages, and (2) the exemption from liability comports with public policy. *Newport*, 453 U.S. at 263-266; *see also Barnes* v. *Gorman*, 122 S. Ct. 2097, 2103 (2002)(recognizing the "traditional presumption against imposition of punitive damages on government entities" under federal statutes). "Damages awarded for punitive

purposes . . . are not sensibly assessed against [a] governmental entity itself," the *Newport* Court reasoned, because the imposition of such damages punishes only citizens who took no part in the commission of the tort. *Newport*, 453 U.S. at 267. Therefore, consistent with *Newport*, local governmental entities such as Cook County and the *amici* are not "persons" subject to the False Claims Act's mandatory punitive damages absent a clear expression of Congressional intent to the contrary.

B. The Presumption Of Local Governmental Immunity Is Not Limited To § 1983 Cases.

In its decision below, the Seventh Circuit suggested, incorrectly, that the presumption of governmental immunity from punitive damages does not attach to local governments under the False Claims Act because, in that court's view, there are important differences between the § 1983 damages regime at issue in *Newport* and the damages provision of § 3729(a). *Chandler*, 277 F.3d at 978. The panel asserted the untenable position that it is appropriate for citizens to bear some of the burden of False Claims Act damages imposed on local governments because, in contrast to a § 1983 case, the local government's constituents have benefited from the ill-gotten gains. *Id.* The panel also determined, without any basis, that the burden shifted to taxpayers will be less onerous under the False Claims Act than under § 1983 because the local government can satisfy a portion of the judgment with the monies it fraudulently obtained. *Id.* Finally, the panel

mistakenly contended that the injury to the public is minimized under the False Claims Act because that statute caps a judge's discretion by limiting damages to three times the federal government's loss, while § 1983 affords a jury unlimited discretion to determine the size of a punitive damages award. *Id.* Because the Seventh Circuit's distinctions between the False Claims Act and § 1983 are illusory, and because its factual assertions are incorrect, its reasoning should be rejected as inconsistent with this Court's decisions in *Newport* and *Stevens*.

Newport stands for the broad proposition that local governmental entities are immune from punitive damages under federal statutes absent specific Congressional direction to the contrary, because the entities' constituents inevitably would be punished for the wrongdoing of others if punitive damages were imposed. 453 U.S. at 267. The Court pointedly noted that punitive damages imposed on a municipality are "in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." *Id.* Even if a local governmental entity properly could be asked to repay what it fraudulently received from the United States, on the theory that its constituents should not benefit from wrongful conduct, the imposition of the mandatory *treble* damages under the False Claims Act inevitably would punish taxpayers and other beneficiaries of civic resources far beyond any benefit those citizens received as a result of the local government's fraud.

Moreover, in many instances, the limitation of a judgment against a local government to treble damages will barely ease the burden inevitably to be borne by the government's constituents. For example, in the *qui tam* case pending in the Northern District of Ohio against the 43 local governmental entities that have submitted this *amicus* brief, the relator has claimed that each of the defendants defrauded the federal government out of millions of dollars when they accepted federal airport improvement grants and certified their compliance with federal environmental laws. A judgment for the relator in that case – which could run into the *billions* of dollars, even before trebling, without any suggestion that the federal government believes there has been any misconduct or wants its grant money back – would result in a massive windfall for the relator at the expense of the traveling public and innocent taxpayers, who would be forced to bear the burden of punitive damages. It is unlikely that even an exceedingly generous jury would, or lawfully could, award greater damages against municipal defendants in any § 1983 action.

II. CONGRESS WAS AWARE OF THE PRESUMPTION OF GOVERNMENTAL IMMUNITY IN 1986, BUT DID NOT DEFINE "PERSON" TO INCLUDE LOCAL GOVERNMENTS.

Whenever Congress enacts a statute, it reasonably expects that the new law will be interpreted in accordance with the Supreme Court's existing jurisprudence. *United States v. Wells*, 519 U.S. 482, 495 (1997). Before Congress amended the False Claims Act in 1986 to

mandate treble damages, the Court repeatedly and unequivocally had recognized that treble damages are inherently punitive. *Stevens*, 529 U.S. at 785-786, citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). *See also American Soc'y of Mech. Eng'rs Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982). The Court therefore may presume that when Congress provided for mandatory treble damages under § 3729(a) in 1986, it recognized that the statute would be enforced as a punitive damages regime.

The Court also may presume that, in light of its 1981 *Newport* decision, Congress was aware when it inserted the punitive damages provision in § 3729(a) that the common law would operate to immunize all local governmental entities from liability under that section unless Congress explicitly said otherwise. Congress nevertheless chose not to include a definition of "person" in § 3729(a), let alone define it to include local governmental entities. The inception of a punitive damages regime in the absence of a definition of "person" that includes governmental entities thus is itself "powerful evidence" that Congress did not intend to subject local governmental entities to punitive damages under § 3729(a). *Dunleavy*, 279 F.3d at 224.

The fact that Congress explicitly has subjected local governmental entities to liability under a number of other federal statutes that impose punitive damages also supports the conclusion that Congress, through its silence, has exempted local governmental entities from the mandatory treble damages of § 3729(a). For example, in the Clean Water Act ("CWA") and the

Resource Conservation and Recovery Act ("RCRA") Congress expressly defined the universe of "persons" subject to their penalties and damages to include local governmental entities. *See* 33 U.S.C. § 1362(5) (defining "person" subject to punitive damages under the CWA to include municipalities and subdivisions of a State); 42 U.S.C. § 6903(15) (defining "person" subject to RCRA damages to include municipalities and subdivisions of a State). That is why an award of punitive damages against municipalities is permitted under both the CWA and RCRA, despite the presumption of governmental immunity articulated in *Newport*.

III. THE INTERPRETIVE PRESUMPTION THAT LOCAL GOVERNMENTS ARE "PERSONS" DOES NOT APPLY TO § 3729(a).

To support its holding that local governmental entities such as Cook County presumptively are "persons" subject to suit under § 3729(a), the Seventh Circuit erroneously relied on the interpretive presumption, articulated in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), that the term "person" in a federal statute applies to local governmental entities. *Chandler*, 279 F.3d at 980. In *Monell*, the Court determined that local governments are "persons" within the meaning of 42 U.S.C. § 1983, and therefore subject to liability for compensatory damages under that statute. In support of its holding, the Court relied on extensive evidence in the legislative history of the Civil Rights Act of 1871 – the precursor of § 1983 – that Congress intended local governments to be subject to that

statute's requirements. 436 U.S. at 665-690. The Court also relied in part on the interpretive presumption, established in the Dictionary Act of 1871 (just months before the enactment of the Civil Rights Act of 1871), that the word "person" in a statute presumptively applies to "bodies politic and corporate," including local governments. *Id.* at 688-689. The Seventh Circuit's reliance on *Monell* to subject Cook County to liability under the False Claims Act is completely misplaced.

The narrow holding in *Monell* – that a municipal corporation is a "person" for purposes of 42 U.S.C. § 1983 – is premised in part "on specific indications in the legislative history of § 1983" that Congress intended that particular statute to reach governmental entities. *Garibaldi*, 244 F.3d at 494. Unlike the False Claims Act, § 1983 focuses liability on *public* defendants – those who act "under the color of state law." *Id.*, citing *Monell*, 436 U.S. at 685-686. There are no indications whatsoever in the legislative history of the False Claims Act, however, that Congress intended to punish fraud by state or local governmental entities. *Stevens*, 529 U.S. at 781. Further, the pertinent provision of The Dictionary Act undergirding the *Monell* decision provides that the term "person" may extend and be applied to local governmental entities "*unless the context shows that ['person'] [was] intended to be used in a more limited sense.*" *Monell*, 436 U.S. at 687-688, citing Act of Feb. 25, 1871, § 2, 16 Stat. 431 (emphasis supplied). In the case of the False Claims Act, the context shows *precisely* that: the legislative history of the Act reveals that it was

enacted "with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War,'" not to penalize local governments. *Stevens*, 529 U.S. at 781, quoting *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976).

As Cook County's brief elaborates, the presumption that the term "person" includes local government was not recognized until 1869, six years *after* the original enactment of the False Claims Act. *Brief of Petitioner*, Section I.A.2. However, even if the Court were to assume that the term "person" in the liability provision of the Act extended to local governmental entities from the inception of the Act in 1863 until 1986, the term "person" cannot be read to extend that far after the 1986 amendments made awards of punitive damages mandatory.

The Court made clear in *Newport*, a case decided three years *after Monell*, that the presumption that a municipality is a "person" does not apply when a statute imposes punitive damages. *See* 453 U.S. at 271. It is precisely for that reason that, in spite of *Monell*, the Court found in *Newport* that municipal defendants are not subject to punitive damages in § 1983 cases. *Id.* Congress was well aware of the *Newport* decision by 1986, yet did not take any affirmative steps to abrogate local governmental immunity from punitive damages under § 3729(a). Consequently, local governmental entities cannot properly be found liable for treble damages under the Act. Because the Act's punitive damages are mandatory, it follows that local governmental

entities are not "persons" within the meaning of § 3729(a).

IV. EXPOSING *ANY* LOCAL GOVERNMENTAL ENTITY TO PUNITIVE DAMAGES UNJUSTLY WOULD PUNISH INNOCENT CITIZENS.

This Court recognized in *Newport* that the imposition of punitive damages against a governmental entity is only proper if imposing them would be consistent with sound public policy. *See* 453 U.S. at 258-259. Subjecting cities, counties and various other local governmental entities around the country, such as the 43 that have joined this brief, to massive punitive damages under the False Claims Act, however, would contravene both of the public policies underlying awards of punitive damages: the punishment of wrongdoers, and the deterrence of future misconduct. *Id.* at 266-267.

If the relator and the federal government were permitted to recover three times the total of all the airport improvement program grants received by the scores of governmental airport proprietors that have been sued in the *qui tam* action pending in the Northern District of Ohio, hundreds of millions of innocent travelers and taxpayers, but not a single alleged government wrongdoer, would be punished. Even if the local governmental entities could pay the federal government's *actual* damages out of the monies they allegedly obtained unlawfully – a dubious proposition, to be sure, given that they have already spent those funds exactly as the FAA wished – citizens with no knowledge of or control

over the submission of the allegedly fraudulent grant assurances inevitably would be saddled with the remaining *punitive* damages.

The governmental airport proprietors with taxing authority would have no choice but to levy taxes to pay for the windfall going to the relator and the federal government (which has never sought to recover any of the grant awards). Moreover, the local governmental defendants likely would be forced to increase fees for the use of airport facilities or to reduce services to the traveling public, to cover the cost of the judgment. *See Newport*, 453 U.S. at 267; *see also Shifa Servs., Inc.* v. *Port Auth. of N.Y. and N.J.*, 1997 U.S. Dist. LEXIS 13611 at *15 (S.D.N.Y Sept. 5, 1997)(holding the Port Authority to be immune from punitive damages under § 1983 because "an award of punitive damages might result in increased tolls, fares, and other expenses borne by the public generally"). In short, if this Court follows the Seventh Circuit in subjecting local governments to False Claims Act liability, all across the country the public will pay – and pay dearly – for alleged misconduct in which it played no part.

Similarly, the goal of deterring future misconduct would not be served by subjecting these local governmental entities to suit under § 3729(a). Travelers, taxpayers and other beneficiaries of public airport services and facilities – the individuals who would pay the lion's share of treble damages in the *Nguyen* case – do not have the capacity to make or deter the allegedly false grant assurances that have given rise to that lawsuit. At the same time, the agents

of local government who are in fact responsible for submitting the allegedly false claims for airport improvement grants, and who have the capacity to submit such claims in the future, will *not* bear the burden of a treble damages judgment, and thus will not be deterred from submitting such claims again. *See Newport*, 453 U.S. at 268 ("[I]t is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality"). A construction of the False Claims Act that yields such dubious results is "supported by neither reason nor justice." *Id.*

CONCLUSION

For all of these reasons, the Court should reverse the decision of the Court of Appeals for the Seventh Circuit, and affirm that local governmental entities are not "persons" within the meaning of § 3729(a) of the False Claims Act.

Respectfully submitted,

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